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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 713

JOSE CASES VELAZQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 40–52) is reported, 131 F. (2d) 916.

JURISDICTION

The judgment of the circuit court of appeals was entered November 27, 1942 (R. 53). The petition for a writ of certiorari was filed December 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crim-

inal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the application of the prior conviction clause of the Federal Firearms Act of 1938 to a person whose conviction took place prior to the effective date of the Act is ex post facto.

2. Whether the Act invalidly abridges the right to bear arms.

3. Whether section 1 (2) of the Act is arbitrary in defining as "interstate or foreign commerce" transactions wholly within a single Territory.

4. Whether section 2 (f) is beyond the power of Congress over commerce, or unreasonable under the due process clause.

5. Whether the definition of "crime of violence" in section 1 (6) is discriminatory.

6. Whether petitioner's prior conviction was for a "crime of violence" as defined in section 1 (6).

7. Whether the first and third counts of the indictment sufficiently allege the receipt of a firearm and ammunition in interstate commerce contrary to section 2 (f).

8. Whether the second and fourth counts of the indictment sufficiently allege the transportation of a firearm and ammunition in interstate commerce contrary to section 2 (e).

9. Whether there was sufficient evidence that the bullets possessed by petitioner were "ammunition" as defined in section 1 (8).

10. Whether the same evidence was available in support of two counts, one for receipt of ammunition under section 2 (f) and the other for transportation under section 2 (e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved herein are set forth in the Appendix, *infra,* pp. 20–21.

STATEMENT

Petitioner was convicted in the District Court of the United States for the District of Puerto Rico, on all counts of a four-count indictment under the Federal Firearms Act of 1938. The first count alleged receipt of ammunition contrary to section 2 (f) of the Act; the second alleged transportation of the same ammunition contrary to section 2 (e); both counts alleged the crimes to have occurred on August 27, 1941. The third count alleged receipt of a firearm contrary to section 2 (f); and the fourth alleged transportation of the same firearm contrary to section 2 (e); both the latter counts alleged the crime to have occurred on August 30, 1941, three days after the date mentioned in the first two counts. (R. 1–4.) Petitioner was sentenced to a three-year term on each of the first two counts, to run consecutively, and was placed upon five years' probation on each of the last two counts, to run concurrently after the

expiration of the sentences on the first two counts (R. 7–8).

The principal evidence was as follows: Petitioner had, on February 13, 1922, been convicted of "aggravated assault and battery" in a Puerto Rico territorial court, and sentenced to one year in jail (R. 20–21). On August 27, 1941, at petitioner's request, a friend purchased at a local hardware store ten bullets (type and calibre unspecified), and turned them over to petitioner. On August 30, 1941, he was in possession of a loaded gun, a .38 calibre Colt Style Revolver made in Spain (R. 21, 22, 23, 37), and transported it about with him to various places in Puerto Rico (R. 22–23). Details of the proof will be stated later, as they become relevant, in the Argument.

Petitioner appealed the conviction to the Circuit Court of Appeals for the First Circuit, making among others the same contentions he now makes here, and the conviction was affirmed (R. 52–53).

ARGUMENT

I

The effective date of the statute (Section 6, 15 U. S. C. 906) was July 30, 1938. The crimes of receiving and transporting were alleged and proved as of August 1941, substantially subsequent to the statute, but the conviction of a crime of violence, which is an essential condition of the

application of the statute, was alleged and proved to have occurred in February 1922, a time substantially prior to the enactment of the statute (R. 20–21). On these facts petitioner asserts (Pet. 5, Br. 13–17) that the court below erroneously rejected his contention that the statute is *ex post facto* as to him, because the statute constitutes an additional punishment for past offenses. The situation herein is even further from being additional punishment for past crimes than is the situation presented by the statutes imposing heavier penalties for a particular crime on recidivists than on first-time offenders. Yet such statutes are not *ex post facto*. *Graham* v. *West Virginia,* 224 U. S. 616; *McDonald* v. *Massachusetts,* 180 U. S. 311; *Beland* v. *United States,* 128 F. (2d) 795 (C. C. A. 5), No. 416 this term, certiorari denied November 9, 1942, rehearing denied November 23, 1942.

Petitioner's second fallacy is in overlooking *Hawker* v. *New York,* 170 U. S. 189, and *Dent* v. *West Virginia,* 129 U. S. 114, 128, which explain and limit the earlier cases relied on by petitioner, *Cummings* v. *Missouri,* 4 Wall. 277; *Ex-parte Garland,* 4 Wall. 333; and *Pierce* v. *Carskadon,* 16 Wall. 234. As the court below pointed out (R. 43, 44), the *Hawker* and *Dent* cases make clear that a legislature need not ignore past dangerous conduct in weighing the necessity for prohibiting future conduct.

II

Both the court below and the Circuit Court of Appeals for the Third Circuit in *United States* v. *Tot* 131 F. (2d) 261, have answered at length the contention (Pet. 8, Br. 17–20) that the statute constitutes an infringement on the right to bear arms guaranteed by the Second Amendment. We feel it unwarranted to do more in this connection than refer to the opinion below (R. 45–47), to that of the Third Circuit in the *Tot* case, 131 F. (2d) 261, and to our brief in the *Tot* case opposing certiorari on this point. Certiorari was not granted on this point in the *Tot* case (R. 93, No. 569) and we submit that it should not be granted herein.

III

Petitioner's next contention (Pet. 8, Br. 20–22) appears to be that the language of Section 2 (e) does not permit its application to transportation wholly, so far as the record shows, within a single territory. He urges that that subsection applies only to transportation "in interstate or foreign commerce", and that Section 1 (2), defining the quoted phrase to include transportation "within any Territory," is an arbitrary classification.

The effect of the definition is to make the substantive provision prohibit transportation of a weapon by an ex-convict "in interstate or foreign

commerce or within a Territory." It is settled that the fact that a statutory definition is arbitrary in terms of common usage is no bar to its legislative employment. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 95–96; *Von Weise* v. *Commissioner of Internal Revenue*, 69 F. (2d) 439, 441 (C. C. A. 8), certiorari denied, 292 U. S. 655. Since petitioner appears to concede what is in any event obvious, that Congress would have had the power to legislate directly with respect to transportation within the territory, there can be no sound complaint against its manner of expressing itself. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *Cusack Co.* v. *Chicago*, 242 U. S. 526; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443.

IV

Petitioner next turns to section 2 (f), under which Counts I and III of the indictment were drawn, and asserts (Pet. 8, Br. 22–25) that it is beyond the commerce power because it asserts regulation of reception of an article without regard to whether the article is still in commerce and asserts that the presumption of interstate commerce is unreasonable.

As we have just demonstrated under Part III hereof, the requirement of "interstate or foreign commerce" is validly defined to include any commerce within Puerto Rico. Accordingly, the

presumption on this score is simply a presumption that the gun and ammunition were acquired either in Puerto Rico or as the termination of a transit into Puerto Rico,[1] and the probability of this presumption is so high that there can be no serious question of its validity as a matter of due process.[2] *Mobile, Jackson & Kansas City R. Co.* v. *Turnipseed,* 219 U. S. 35, 42; *Casey* v. *United States,* 276 U. S. 413, 418. Consequently the question is not present here which justified review in *United States* v. *Delia,* No. 636, and *Tot* v. *United States,* No. 569, although the court below did not make such a distinction (R. 49).[3]

[1] The charge to the jury did not proceed on this construction but instead assumed the usual definition of interstate commerce (R. 31). However, any error on that score is immaterial because the charge on this point was gratuitous: the evidence showed possession and no evidence tended to rebut the presumption on either construction. Moreover, petitioner did not except to this portion of the charge or request any substitute. He is therefore in no position to complain of the charge on review.

[2] The only other possible manner of acquisition is that petitioner himself brought it into Puerto Rico, in violation of section 2 (e). Petitioner does not raise the question of time of acquisition discussed in our brief in the *Delia* case, No. 636, pp. 38–42, and the record does not permit him to raise that question because it is silent as to the age of the gun and the date of his acquisition of it.

[3] Our statement in the Delia petition (p. 5) and the Minski petition (p. 6) that the decision below conflicted with that of the Sixth Circuit in the *Delia* and *Minski* cases was erroneous. It was based on the opinion of the court below, before the record was served on us.

V

Petitioner's next complaint (Pet. 8, Br. 25–26) is that the Act is discriminatory in that its definition of "crime of violence" turns in part on state laws which vary from place to place both in the definition of the crime and in the punishment, both of which may be material in determining whether a crime is or is not one of "violence," so that the same previous acts which in one state bring a man within the instant statute would if committed in other states leave him outside the statute. To this the short answer was given by the court below, that "Practical uniformity is enough" (R. 50). Meticulous accuracy of classification is not required, and failure to meet all like evils, under a classification patently directed at a substantial and identifiable bulk of the evil, will not invalidate the classification. *United States* v. *Carolene Products,* 304 U. S. 144, 151; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 46; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 400. See also *McDonald* v. *Massachusetts,* 180 U. S. 311, 313.

VI

Petitioner also urges (Pet. 8, Br. 26–29) that his previous Puerto Rican conviction of "aggravated assault and battery" is not conviction of crime of violence as that term is defined in Section 1 (6) of the Act, and that his demurrer to

the indictment should therefore have been sustained. Section 1 (6) defines "crime of violence" to include:

> * * * assault with intent to commit any offense punishable by imprisonment for more than one year.

Petitioner's contention rests on the idea that "aggravated assault and battery," notwithstanding that it carries under local law a punishment of up to two years' imprisonment, is not "assault with intent to commit" anything, but is a crime which is simply not enumerated in the instant statute.

The statute under which petitioner's Puerto Rican conviction took place, however, defines an assault as "any *attempt* to commit a battery, or any threatening gesture showing in itself an immediate *intention,* coupled with an ability to commit a battery"; defines a battery as the use of unlawful violence to the person with "*intent* to injure him," and defines an "aggravated assault and battery" as one committed under certain stated circumstances. (Puerto Rican Act of March 10, 1904, sections 1 and 6.) (Italics supplied. The statute is reprinted in the petition, pp. 34 *et seq.*) As the court below pointed out, every "aggravated assault and battery" is thus at the very minimum an assault which is coupled with an intent to commit the sort of battery punishable by more than one year's imprisonment.

Just as a conspiracy charge (*Heike* v. *United States,* 227 U. S. 131, 144), or an attempt (Penal Code of Puerto Rico (1937) sec. 49), lies notwithstanding the consummation of the crime, so is the completed assault and battery subject to analysis as an assault with such intent. It is the substance of the crime rather than the variant choices which local legislatures may make in expressing it, which must be determinative under a test which is to operate throughout all the states and territories.

VII and VIII

Petitioner's final contention as to the sufficiency of the indictment is that it does not sufficiently allege receipt (Counts I and III) and transportation (Counts II and IV) in interstate commerce. All four counts are drawn in a form alleging that the objects involved "had theretofore been shipped and transported in interstate commerce" (R. 2–4). The bare statement of the contention in the petition, p. 8, is ampified in the brief, pp. 29–30, as based on a distinction between activity by petitioner *in* interstate commerce and activity merely *after* independent interstate commerce.

The point is not argued by petitioner with respect to Counts II and IV. Had it been properly raised on demurrer, it might have had weight at least as to those two counts, for they

relate to transportation under section 2 (e), which makes it unlawful to "transport * * * *in* interstate or foreign commerce." [Italics supplied.] But as to Counts I and III, the form used in the indictment is an adequate paraphrase of the statutory language, charging receipt under section 2 (f), for the statutory word "receive" itself, as we showed in our brief in *United States* v. *Frank Delia,* p. 12, imports consummation of a transaction which prior thereto was incomplete. The recital in the bare terms of section 2 (f) was therefore adequate pleading of the counts which sounded under that subsection, and a further recital that the receipt took place *in* interstate commerce would have been merely redundant. *Potter* v. *United States,* 155 U. S. 438, 444.

Petitioner is not, however, in position to avail himself of any insufficiency of the indictment with respect to the point he now stresses, for the reason that claim of insufficiency of the indictment is open to him on review only because of the overruling of his demurrer to the indictment, and the demurrer to the indictment on this score gave no inkling of the ground on which the point is now sought to be rested. On its face the demurrer was without merit, for it merely asserted that the indictment was defective for want of allegations that were patently present in it or were matter of evidence at best. The demurrer

recited that the indictment failed to state facts sufficient to constitute a crime because, among other things:

> (c) The first and third counts of the indictment do not allege facts sufficient to show a shipping or transportation in interstate or foreign commerce or to show knowledge on the part of the defendant of the interstate character of the goods, if any.
>
> (d) The second and fourth counts of the indictment do not allege facts sufficient to show a shipping or transportation in interstate or foreign commerce, or to show any transportation by defendant (R. 5).

The indictment was not open to any of the four objections recited in the demurrer. Counts I and III, and Counts II and IV, alike, stated that there had occurred an interstate shipping or transportation which "had theretofore been shipped and transported in interstate commerce") (R. 2–4). To plead knowledge of the shipment or transportation in Counts I and III would have been to plead evidence, and insufficient evidence at that because mere knowledge of an independent prior interstate shipment or transportation would not suffice for liability without participation therein. Finally, transportation by petitioner (that he "did * * * transport" (R. 2, 4)) was specifically pleaded in Counts II and

IV. Thus because of petitioner's failure to point out the matter now complained of, the trial court had no occasion to treat the demurrer as being anything other than what it purported to be on its face, an overtechnical complaint of want of allegations which in fact appeared in the indictment or were matters of evidence which did not need to appear, comparable to the *pro forma* generalities which next followed in the demurrer:

> 2. That said indictment is unintelligible because of uncertainty;
>
> 3. That said indictment is ambiguous because it is uncertain and unintelligible (R. 5).

Since the actual evidence in the case was insufficient to raise the distinction now asserted by petitioner in his brief, reviewing a demurrer which, like the request for charge condemned in *Ulman* v. *Manheimer,* 249 Fed. 691, 696 (C. C. A. 6), "covers up as much as it discloses of the contention afterwards made," would amount to sanctioning an entrapment of the trial judge. Cf., on the requirement that demurrers to indictments make a clear statement of the specific ground on which they rest, *United States* v. *Reece,* 280 Fed. 913 (D. Idaho); *Hedderly* v. *United States,* 193 Fed. 561 (C. C. A. 9).

IX

Petitioner contends (Pet. 9, Br. 31–32) that there was no evidence that the ammunition which was the subject of Counts I and II was "ammunition" within the definition of Section 1 (8) of the Act. That definition excludes many types of cartridges, shells and bullets, being in general restricted to loads suitable for pistols and revolvers, and petitioner asserts that there was insufficient evidence to determine whether the ammunition involved was pistol or revolver ammunition or some other sort.

The indictment charged that on August 27, 1941, petitioner received (Count I) and transported (Count II), "a certain amount of revolver ammunition, to wit, approximately ten bullets" (R. 2). The principal evidence on the point is that on the date stated petitioner sent a friend to a local hardware store in Puerto Rico to purchase ten bullets for him, and the friend turned the bullets over to him (R. 23). But although there was evidence that petitioner owned a .38 calibre revolver (R. 37), the one alleged and proved under Counts III and IV, there was no direct evidence on whether the bullets purchased were for that gun, nor whether petitioner owned any other guns. The court below held that there was sufficient evidence that the bullets were .38s, reciting that

> The evidence is that on August 27 the appellant sent a friend into a hardware store to get him ten rounds of ammunition; that the friend entered the store, asked for ten rounds of ammunition for the appellant giving the storekeeper the appellant's nickname; that the appellant was well known in the store and that it was commonly known that he customarily carried a .38 caliber revolver; and that the friend brought ten rounds of ammunition out of the store and gave it to the appelland who carried it away. * * * (R. 51–52.)

Petitioner asserts, and we agree, that the record contains no such details, being restricted to the facts which we have stated as to the acquisition of the bullets on August 27, 1941, and to the fact that it was known among certain of petitioner's intimates that he customarily carried a .38 revolver and displayed it openly (R. 22, 23). But whether these circumstances are sufficient to ground a circumstantial inference that the bullets acquired on the 27th were .38s need not be considered, nor have we made any attempt to ascertain whether the record has been diminished, for possession and transportation of .38 bullets on August 30, three days later, was proved. The evidence as to August 30, which proved the possession and transportation of the gun (Counts III and IV), was that he then fired the gun (R.

21–24). The proof of the firing of the gun supplies clear evidence that petitioner then possessed and transported the ammunition he then shot out of the gun, and since the gun was a .38 pistol there can be no question but that the ammunition was .38 pistol ammunition within the statutory definition. The only difference between allegation and proof would be three days of time, and an indefinite number rather than the specifically alleged "ten" bullets. This is of course an immaterial variance. *Ledbetter* v. *United States,* 170 U. S. 606; *Gleckman* v. *United States,* 80 F. (2d) 394, 400–401 (C. C. A. 8).

X

Petitioner's last contention (Pet. 9, Br. 33) is that "There was, as to the ammunition, only one transaction shown," and that therefore "if there was a crime committed it was one and not two." If we understand this contention correctly, it is that the same evidence cannot be used to make out the two different crimes of receiving under Section 2 (f) and of transporting under Section 2 (e). No cases are cited by petitioner on the point, although he remarks (Br. 33) "The same act may constitute an infringement of two different statutes but the same statute cannot be infringed in two different ways by only one act." The court below regarded the point as too tenuous for discussion (R. 52). It

may be shortly dismissed by pointing to the common and sanctioned practice of joinder of multiple counts in bootlegging cases, where the facts which prove one count lead to a circumstantial inference as to another. *Rossi* v. *United States*, 289 U. S. 89. Proof of transportation of ammunition contrary to Section 2 (e) patently involves proof of possession, which in turn leads to a presumption of receipt contrary to Section 2 (f).

CONCLUSION

The decision below was correct, there is no conflict of decisions nor any question of general importance involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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